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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 IN RE OPTICAL DISK DRIVE PRODUCTS
15 ANTITRUST LITIGATION

No. 3:10-md-2143 RS (JCS)

16 INDIRECT PURCHASER PLAINTIFFS'
17 RESPONSE TO EMERGENCY MOTON
FOR TEMPORARY RESTRAINING
ORDER (ECF NO. 3108)

18 DATE ACTION FILED: Oct. 27, 2009

19 This Document Relates to:

20 ALL INDIRECT PURCHASER ACTIONS
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1 Given the Court’s framing of the request, Indirect Purchaser Plaintiffs treat the motion for
2 “temporary restraining order” (ECF No. 3108) as a class member objection warranting a response.

3 The Court is free to order a modified distribution plan, should it choose. Class Counsel
4 recommended, and believe that the proposed plan is the most appropriate given the equities, cost, and
5 efficiency, but will oversee whatever distribution plan the Court decides is appropriate.

6 But Objector Pat Zheng Zhen is incorrect that the existing orders compel a distribution which
7 mirrors the same per-device *pro rata* as the initial distribution. Procedurally, when the Court
8 approved the revised plan on April 7, 2022, the details of the second distribution were not
9 determined. Instead, Class Counsel were ordered to file “a proposed plan for Second Round
10 Distribution” by September 2, 2022.¹ Complying with that directive, one of the claims
11 administrators recently explained that “[t]he Phase II second round distribution amount was
12 determined to be a flat \$133.93 for the 249,574 class members who accepted their payment in the
13 Phase I distribution.”² This is consistent with the Court’s order approving the plan of distribution.
14 The Revised POD Order calls for “a final *pro rata* payment to all payees who took a payment in the
15 Initial Payment Offering,” with an emphasis, as is common with supplemental distributions, on a
16 streamlined approach getting the remaining funds to class members who submitted claims.³ As the
17 Court stated in the Revised POD Order: “This final phase delivers funds to all entitled claimants with
18 the intent of taking the settlement balance as close to \$0 as possible (except for outstanding physical
19 checks issued by Epiq).”⁴

20 The timing of events also does not suggest any intent to require, for the second distribution,
21 complex or per-device calculations. If that were so, Class Counsel would not have proposed only 17
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25 ¹ Order Approving Indirect Purchaser Plaintiffs’ Revised Plan of Distrib. and Schedule, ECF No. 3089 at 2 (filed Apr. 7, 2022) (“Revised POD Order”).

26 ² Decl. of Chris Whipps (DigitalPay) Re First Round Distrib. and Proposed Plan for Second Round Distrib., ECF No. 3107 at ¶7 (filed Sept. 2, 2022).

27 ³ Revised POD Order at 2.

28 ⁴ *Id.*

1 days between the due date for the “proposed plan for Second Round Distribution” (September 2) and
2 when this distribution would take place (starting September 19).⁵

3 But there are many reasons supporting a second round of distribution which is a flat *pro rata*
4 amount for class members, rather than the more complicated per-device *pro rata* which occurred in
5 the initial round. The Court has “considerable discretion” to determine the terms of class action
6 settlements under Fed. R. Civ. P. 23, and can certainly order either of the two approaches.⁶

7 The flat *pro rata* approach has the benefit of costing the class (as a whole) less. As a rough
8 estimate, the claims administrators have advised that revising the second distribution as Zhen
9 proposes would delay it by 8 to 10 weeks to perform all calculations, and trigger approximately
10 \$58,000-\$65,000 in additional administrative costs to the class.

11 Modifying the second-round distribution to a per-device *pro rata* distribution would mean a
12 substantial number of claimants would be entitled to less than \$1. One reason Class Counsel
13 proposed the flat *pro rata* distribution was to allow all 249,574 class members who accepted their
14 payment to participate in this second round. If a per-device *pro rata* calculation is used, it might
15 make sense to put a floor on the amount of a payment to be made to class members (e.g., a minimum
16 \$5 payment). At some point, administrative costs associated with the return of a small dollar amount
17 might not serve the best interests of the class. But stopping payment of the lower dollar value sums
18 would then stop payment to the very class members that the indirect purchasers sought to represent –
19 individuals and households who purchased computers containing price-fixed ODDs – favoring the
20 corporate entities which purchased large volumes of ODDs. While this is certainly an acceptable
21 distribution plan, it was not the one suggested by Class Counsel.

22 Other Courts have followed this pathway of a differentiated first round, followed by a
23 simplified *pro rata* class member calculation in the second round. For example, in *Edwards v.*
24 *National Milk Producers Federation*, Case No. 11-cv-04766-JSW, the first round of distribution had
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27 ⁵ *Id.* at 1-2.

28 ⁶ *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liab. Litig.*, 895 F.3d 597, 606 (9th Cir. 2018).

1 payments made on a per individual and per entity basis of differing amounts.⁷ In the second round of
 2 distribution Class Counsel recommended, and Judge White ordered the same *pro rata* flat payment
 3 suggested here, a “*pro rata* basis only to payees who acted on the payment they were issued in Phase
 4 I.”⁸

5 Regardless of the distribution ordered by the Court, the interests of the class support an
 6 efficient, cost-effective means to ensure as much of the settlement funds are returned to the class as
 7 possible. Class Counsel are prepared to proceed as the Court directs.

8 DATED: September 13, 2022

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 25 ⁷ *Edwards v. Nat’l Milk Producers Fed’n*, Case No. 11-cv-04766-JSW, Decl. of Chris Whipps re
 Distribution, ECF No. 539 (filed July 19, 2021), ¶ 6 (“Payment amounts to be distributed to
 26 claimants are based on the Court-ordered ratio of 1 to 28 for consumer to organization payments.
 Accordingly, DigitalPay anticipates a payment amount of \$7.51 for individuals and \$210.28 for
 organizations.”).

27 ⁸ *Edwards v. Nat’l Milk Producers Fed’n*, Case No. 11-cv-04766-JSW, Corrected Unopposed
 28 Am. Distrib. Schedule and Order, ECF No. 544 (filed Nov. 10, 2021).